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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CASS COUNTY, *et al.*,
Petitioners,
v.
LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE HOOPA VALLEY TRIBE, THE NEZ PERCE TRIBE, THE QUINAULT INDIAN NATION, AND THE SPOKANE TRIBE OF INDIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the mere fact that land owned by an Indian tribe within its reservation is freely alienable evidences clear congressional intent to grant jurisdiction to states and their political subdivisions to tax that land.

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INTERESTS OF THE *AMICI CURIAE*

Amici are four federally recognized Indian tribes that have a compelling interest in the determination of the question presented to this Court: whether the mere fact that land owned by an Indian tribe within its reservation is freely alienable evidences clear congressional intent to grant jurisdiction to states and their political subdivisions to tax that land.[1] A reversal by this Court of the decision

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6, amici state that no counsel for a party has

of the Court of Appeals for the Eighth Circuit in *Cass County, et al. v. Leech Lake Band of Chippewa Indians,* 108 F.3d 820 (8th Cir. 1997), would have a significant detrimental impact on amici.

Amici are the Hoopa Valley Tribe, the Nez Perce Tribe, the Quinault Indian Nation and the Spokane Tribe of Indians. Amici all own property in fee within the boundaries of their respective reservations, property which was allotted under various federal statutes and/or treaties in the 19th Century and that has subsequently been reacquired by amici. Petitioner Cass County contends that state and local governments can tax such property merely by showing that the reservation land is freely alienable by the tribal owner and without regard to the statute or treaty under which the property was originally conveyed. Cass County's position, however, is in direct conflict with this Court's "consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,* 502 U.S. 251, 257 (1992) (internal quotation marks omitted). The Court of Appeals for the Eighth Circuit correctly ruled in this case that Congress has never explicitly granted general jurisdiction to states or their subdivisions to tax reservation lands owned by tribal governments if those lands were not allotted to individual Indians pursuant to the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388 (1887) ("GAA"). Resp. App. at A-9-A-15. Reversal of that decision would harm amici and other similarly situated tribes by permitting the taxation of reservation land restored to tribal possession, and by unduly burdening the fee to trust process which Congress intended in part to repair the damage of the allotment era.

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authored this brief in whole or in part, and that no person or entity other than the amici, their members, or their counsel, has made a monetary contribution to the preparation or submission of the brief.

Amici are gravely concerned over Cass County's attempt to persuade this Court to adopt a new rule of law that directly contradicts this Court's previous cases and federal policy. Amici support Respondent Leech Lake Band of Chippewa Indians ("Leech Lake" or "Respondent") in seeking affirmance of that portion of the Eighth Circuit's decision before this Court.

SUMMARY OF ARGUMENT

Petitioner Cass County proposes a new rule of law to control the outcome of this case that would replace well-settled precedent. This Court has long recognized that state taxation of land owned by Indians and Indian tribes in Indian Country[2] is allowed only where Congress has made its intention to do so unmistakably clear. Cass County concedes it cannot meet this standard, and instead urges this Court to create a new rule that "alienability equals taxability," under which states and their political subdivisions can tax all fee land in Indian Country so long as the land is "freely alienable."[3] As

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[2] Amici use the terms "Indian Country" and "reservation land" where appropriate throughout this brief. Reservations, which are at issue here, are a subset of "Indian Country" as defined in 18 U.S.C. § 1151 (1994):

> . . . (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

[3] As demonstrated in Respondent's brief, there is serious debate as to whether tribally owned land in Indian Country is "freely alienable," due to the constraints of the Indian Nonintercourse Act, 25 U.S.C. § 177.

Respondent Leech Lake demonstrates in its brief, the "unmistakably clear intent" rule should determine whether Cass County can tax reservation lands owned by Indian tribes. Amici support this argument, and demonstrate herein that this Court has consistently required an "express" or "explicit" statement of congressional intent.

In addition, the Court should reject Cass County's proposed general rule that "alienability equals taxability" because "alienability" cannot be determined generally by reference to Sections 5 and 6 of the General Allotment Act. Indian land was alienated through a number of individually negotiated allotment statutes and treaties, not only through Sections 5 and 6 of the GAA. These other statutes and treaties differ from the GAA; some have no provisions regarding taxation, some do, and all are separate and distinct from the GAA in their particular wording and history.

Finally, amici demonstrate that adoption of Cass County's "alienability equals taxability" rule would substantially thwart the intent of Congress and frustrate the ability of the Executive Branch to implement the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (1994) ("IRA"). Congress passed the Indian Reorganization Act in recognition of the miserable failure of the assimilation and allotment policies of the 19th Century, and intended in the IRA that tribes and/or the federal government purchase land and that such land be taken into trust. Adoption of the rule sought by Cass County would unduly burden the fee to trust transfer process envisioned by the IRA, and would wrongfully place the burden of the tax on Indian tribes. Statistics from the Bureau of Indian Affairs demonstrate that the fee to trust process is already overly-attenuated and that adoption of the proposed "alienability equals taxability" rule would likely result in fewer fee to trust transfers.

ARGUMENT

I. CONGRESSIONAL AUTHORIZATION OF STATE TAXATION ON RESERVATION LANDS OWNED BY INDIAN TRIBES MUST BE EXPRESS OR EXPLICIT.

The Respondent's Brief ably demonstrates that in *Yakima* this Court recognized the longstanding rule that state taxation of Indians and Indian land in Indian Country is allowed only where Congress has made "its intention to do so unmistakably clear." *Yakima*, 502 U.S. at 258 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). This Court in *Yakima* allowed taxation only after it accepted Yakima County's "threshold assessment" that Section 6 of the GAA, as amended, provided the necessary "express authority" for taxation by the state of the lands there at issue. *Id.*

This Court has consistently required an "express" or "explicit" statement of congressional intent as a condition of state taxation of Indian tribes, tribal members, or reservation land in Indian Country. A survey of this Court's cases, before and after *Yakima*, confirms the consistency of that requirement, which should be applied here.

A. Cases Prior to *Yakima* Consistently Required Explicit Congressional Intent to Allow State Taxation in Indian Country.

The *Yakima* Court cited two examples of the rule that congressional intent to permit state taxation of tribally-owned land within Indian Country must be "unmistakably clear." In *Blackfeet Tribe*, the Court held that state taxes on oil and gas leases signed with tribes after the passage of the Indian Mineral Leasing Act of 1938 were impermissible. 471 U.S. at 768. The 1938 Act was enacted subsequent to a 1924 Act which provided that such leases "may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands." *Id.* at 763 (quoting Act of May 29, 1924, ch.

210, 43 Stat. 244, 25 U.S.C. § 398). After noting that congressional intent to allow state taxation of Indians or their land must be "unmistakably clear," the *Blackfeet Tribe* Court found that the 1924 Act contained "such an *explicit* authorization," *id.* at 765 (emphasis added), but went on to hold that the 1938 Act did not. In fact, the silence of the 1938 Act on the issue, coupled with the canons of construction favoring Indians, was sufficient to effect a repeal of the 1924 taxation language with respect to leases after 1938. *Id.* at 765-66.

The second citation in *Yakima* to the "unmistakably clear" rule was to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). While the issue of taxation was not before the *Cabazon* Court, the majority set out a lengthy footnote to emphasize that although many tribal/state issues are resolved by balancing the respective interests, state taxation of Indians is precluded by a *per se* rule absent "unmistakably clear" congressional consent. 480 U.S. at 215 n.17. The Court explained, "[w]e have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak." *Id.*

Tracing the evolution of this Court's Indian tax jurisprudence back even further leads to the Court's unanimous decision in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). Quoting a Department of the Interior publication on federal Indian law, the *McClanahan* Court adopted the following summary of the "relevant law":

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of *express authority* conferred upon the State by act of Congress.

Id. at 170-71 (citation omitted, emphasis added). Analyzing the applicable treaties and statutes, the Court concluded that imposition of the income tax which Arizona sought to impose in that case was impermissible. The Court observed that other legislation proved that Congress must have "assumed that the States lacked the power to impose the taxes without *special authorization.*" *Id.* at 177 (emphasis added).[4]

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court considered a question reserved in *McClanahan*: whether the grant to some states of civil jurisdiction over Indians on Indian reservations by § 4 of Pub. L. 83-280,

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[4] The Court referred to two acts of Congress of general application as examples of congressional understanding that "reservation Indians" are presumably not taxable. First, it cited the Buck Act, 4 U.S.C. § 105 *et seq.*, which governs taxation in federal areas. After discussing specific provisions, the Court explained that

> it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization.

McClanahan, 411 U.S. at 177 (footnotes omitted). The "narrower statutes" to which the Court referred included 25 U.S.C. § 398 (congressional authorization for states to tax mineral production on unallotted tribal lands); the Court also made a comparison to 18 U.S.C. § 1161 (state liquor laws may be applicable within reservations), and to 25 U.S.C. § 231 (state health and education laws may be applicable within reservations). *See* 411 U.S. at 177 n.16. Second, the Court observed that 25 U.S.C. §§ 1322 and 1324 require tribal consent before a state can assume civil jurisdiction in Indian Country. "[W]e cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. *See Kennerly v. District Court*, 400 U.S. 423 (1971)." *McClanahan*, 411 U.S at 178.

67 Stat. 589, *codified at* 28 U.S.C. § 1360 ("Pub. L. 280"), also conferred the power to tax. Pub. L. 280 contains no specific reference to taxation. While examining the legislative history of Pub. L. 280, the *Bryan* Court observed "the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations." *Id.* at 381. After analyzing the history and structure of the statute, the Court explained that the congressional policy in more recent, related legislation also supported the conclusion of nontaxability. *Id.* at 384-86. The Court stated that Congress knows how to write explicit language allowing taxation of reservation Indians and land, cited examples, and therefore concluded, "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers over reservation Indians, it would have *expressly* said so." *Id.* at 390 (emphasis added). The Court sought an express statement of congressional intent, instead found silence, and therefore held that taxation of Indians had not been authorized.

Thus, while some decisions of this Court allow state taxation of sales of goods to non-tribal members living within Indian reservations,[5] this Court has not allowed the taxation of a tribe or tribal members located on a reservation and engaged in on-reservation activity absent an express authorization by Congress. *See Colville*, 447 U.S. at 162-64 (motor vehicle tax on members invalid); *Bryan*, 426 U.S. at 393 (personal property tax on mobile home invalid); *Moe*, 425 U.S. 480-81 (various taxes on tribal members invalid). *Cf. White Mountain Apache*

[5] *See, e.g., Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991) (cigarette taxes); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 158-60 (1980) (same); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976) (same).

Tribe v. Bracker, 448 U.S. 136 (1980) (state taxation of nonmembers' on-reservation logging activities preempted because overly burdensome on federal Indian logging policy).

B. The Court's Indian Tax Jurisprudence Since *Yakima* Confirms the Necessity of Express Congressional Intent.

The Indian tax cases decided by this Court since *Yakima* support the conclusion that congressional intent to allow state taxation must be explicit. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court considered a motor fuel tax which Oklahoma attempted to impose on tribal retailers. The State argued for the first time to this Court that the Hayden-Cartwright Act, 4 U.S.C. § 104, authorized taxation of motor fuel sales on "United States military or other reservations." Invoking the rule that issues not presented prior to briefing on the merits will only rarely be heard, the Court refused to consider the statutory claim, 515 U.S. at 456-57, and put the question before it in these terms: "[a]ssuming, then, that Congress has not *expressly authorized* the imposition of Oklahoma's fuels tax on fuel sold by the Tribe, we must decide if the State's exaction is nonetheless permitted." *Id.* at 457 (emphasis added). Absent express authorization, the Court determined that the tax would only be allowed if the legal incidence fell not on the tribe or tribal members but on non-Indians. *Id.* at 458-59. As the incidence of the fuel tax at issue was held to fall on tribal retailers, the categorical approach and the lack of "express authorization" led to the conclusion that the fuel tax was impermissible. *Id.* at 461-62.[6]

[6] As described in *Chickasaw*, where the legal incidence of a tax falls on a tribe or tribal members in Indian country, "absent a cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians." 515 U.S. at 461 (quoting *Yakima*). Unlike the cases in which the Court has previously considered where the

Another attempt by Oklahoma to impose income taxes and motor vehicle taxes on tribal members also confirms the express congressional authorization necessary to make such taxes permissible in Indian Country. In *Oklahoma Tax Comm. v. Sac and Fox Nation*, 508 U.S. 114 (1993), this Court concluded that a motor vehicle tax was not tailored to cover only off-reservation use and remanded the matter to determine whether the tribal members potentially subject to the income tax resided in Indian Country. For present purposes, the conclusion to the unanimous opinion is sufficient to state the rule:

> Absent *explicit congressional direction* to the contrary, we *presume* against a State's having jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.

Id. at 128 (emphasis added).

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legal incidence falls, there is only one potential taxpayer of a property tax. As a practical matter, therefore, the incidence of a real property tax falls on the owner of the land, and it is the owner who will lose the property through a tax sale if the taxes are not paid.

A formalistic application of the incidence test could conceivably suggest that the incidence falls on the land itself, as may in fact be implied by *Yakima*. 502 U.S. at 266. Such a result, however, would not only be highly formalistic, it would also create another level of complexity in Indian taxation. In some states, including Washington, property taxes attach solely to the land. *See id.* In others, property taxes also create personal liability for the owner. *See, e.g., Appeal of Municipality of Penn Hills*, 519 A.2d 1090, 1091 (Pa. Cmwlth. 1987), *aff'd*, 546 A.2d 50 (Penn. 1988); *Dillman v. Foster*, 656 P.2d 974, 978 (Utah 1982); *Coulter v. Gough*, 454 P.2d 969, 970 (N.M. 1969).

In at least one state, the situation is even more complex. In California, property is considered "secured" so long as the state can, if necessary, foreclose on the property itself if taxes go unpaid. Owners of property on the secured roll are not personally liable for property taxes. *Garcia v. Santa Clara County*, 151 Cal. Rptr. 80 (Cal. App. 1978). But if the land is transferred into trust or a tax lien otherwise becomes unenforceable or disappears, the land is transferred to the "unsecured roll," and the taxpayer becomes personally liable. *Id.*

II. DIFFERING LAND ALIENATION PROVISIONS IN INDIVIDUAL ALLOTMENT STATUTES LACK THE UNMISTAKABLY CLEAR INTENT TO TAX TRIBAL LANDHOLDERS FOUND BY THIS COURT IN SECTIONS 5 AND 6 OF THE GAA.

Cass County's "alienability equals taxability" argument depends upon the "alienability" of tribally owned reservation land being uniform, evidencing a uniform congressional intent. More particularly, Cass County's theory requires that "alienability" be defined by Sections 5 and 6 of the GAA, as this is where this Court found an "unmistakably clear congressional intent" that land alienated thereunder could be subject to state tax. The historical facts of Indian land alienation, however, render the concept of "alienability" unsusceptible to a uniform definition: Indian land alienation occurred through a great number of allotment statutes, not only the GAA. Therefore, the consequences of GAA alienability cannot be imposed upon all Indian land alienation. Instead, to apply the "unmistakably clear intent" requirement fairly and properly, an individual assessment of each statute under which land alienation occurred is required.

A. Indian Land Alienation Occurred Through a Number of Allotment Statutes, Not Only Sections 5 and 6 of the GAA.

The alienation of Indian land was accomplished through a number of statutes in addition to the GAA. Allotment agreements with tribes existed before the GAA was enacted; they existed, in fact, prior to the founding of the Republic. "The allotment concept was not new; Indian lands had been allotted as early as 1633 and the allotment concept had been developing and gaining in popularity

for some time." Felix S. Cohen, *Handbook of Federal Indian Law* 129 (1982 ed.) (footnotes omitted) (hereafter "Cohen"). Moreover, these early allotment agreements did not have uniform alienation terms; the allotments "were commonly known as 'reservations,' and various forms of tenure were imposed upon them. Some lands were held in trust, others granted in fee simple." *Id.* (citing Treaty with the Chickasaws, Sept. 20, 1816, 7 Stat. 150; Act of Mar. 3, 1817, ch. 88, § 1, 3 Stat. 380, 380-81 (implementing Treaty with the Creeks, Aug. 9, 1814, 7 Stat. 120); Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189; Treaty with the Wyandots, Seneca, Delawares, Shawanese, Potawatomees, Ottawas, and Chippeways, Sept. 29, 1817, 7 Stat. 160; Treaty with the Piankishaws, Dec. 30, 1805, 7 Stat. 100). The GAA did not alter the substantive rights of Indian land owners under these agreements. *United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan,* 106 F.3d 130, 135 (6th Cir.) (citing *United States v. Kopp,* 110 F. 160, 165-66 (D. Wash. 1901), *petition for cert. filed,* 66 U.S.L.W. 3085 (June 30, 1997) (No. 97-14).

In addition to the allotment statutes and treaties entered into prior to enactment of the GAA, the GAA specifically excluded certain other allotment statutes from its provisions. Section 8 of the GAA (25 U.S.C. § 339, as amended) noted that "[t]he provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order." Separate allotment statutes were enacted for these tribes, *Witt v. United States,* 681 F.2d 1144, 1147 (9th Cir. 1982), and they "included specific tax exemption provisions." Cohen at 394 n.36.

As a result of tribe-by-tribe negotiations, numerous other allotment statutes specific to individual tribes were enacted to alienate what the United States deemed to be "surplus" Indian land. The GAA specifically provided for such separately negotiated agreements in section 5 (25 U.S.C. § 348, as amended):

> [I]t shall be lawful for the Secretary of the Interior to negotiate with such Indian tribes for the purchase and release by said tribe, in conformity with the Treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress[.]

Such land was not alienated under the terms of sections 5 and 6 of the GAA but rather under individually negotiated agreements with each tribe. *See Solem v. Bartlett,* 465 U.S. 463, 467 (1984) ("Initially, Congress legislated its Indian allotment program on a national scale . . . but at the time of the Act of May 29, 1908, Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise.") (footnote omitted). *See also* Judith V. Royster, *The Legacy of Allotment,* 27 Ariz. St. L.J. 1, 29 (1995) ("While the GAA authorized the sale and homesteading of the surplus lands, the program was implemented through specific lands acts for particular reservations.").

Indeed, the Nelson Act at issue in this case is an example of a negotiated agreement that only partly incorporates provisions of the GAA. As recognized by the Eighth Circuit, "[f]or the Leech Lake Band and other

Minnesota Chippewa tribes, the allotment policy was carried out through the Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889), which partially incorporated the GAA. . . . The allotment of land to individual Indians . . . was done in conformity with the GAA. . . . The rest of the land was made available to the general public . . . under . . . the pine lands provisions [or] the Homestead Act . . . ." 108 F.3d at 823. *See, e.g., Yellowstone County v. Pease,* 96 F.3d 1169, 1171 (9th Cir. 1996) ("The property was allotted and patented in fee to Pease's father under the Crow Allotment Act of 1920, 41 Stat. 751."), *cert. denied,* 117 S.Ct. 1691 (1997). *See also* Monroe E. Price, *Law and the American Indian* 546 (1973) ("In 1890 the Commissioner reported, 'In numerous instances, where clearly desirable, Congress has by special legislation authorized negotiations with the Indians for portions of their reservations without waiting for the slower process of the general allotment law.' ").

B. The Taxability of Reservation Lands Alienated Under Statutes Other Than Sections 5 and 6 of the GAA Is Not Defined by the Alienation Provisions Set Forth in Sections 5 and 6 of the GAA.

No provision of the GAA purports to govern all tribes or all other allotment statutes. The GAA merely empowers the President to make allotments under certain circumstances, such as for lands which "may be advantageously utilized for agricultural or grazing purposes." 25 U.S.C. § 331. GAA provisions simply do not "govern land grants that are not made pursuant to the Act." *Saginaw Chippewa,* 106 F.3d at 135; *see also United States v. Kopp.* 110 F. at 165-66 (holding that the GAA did not change the substantive rights of Indian land owners whose land was alienated according to agreements predating the GAA).

C. The Various Allotment Laws Contain Taxation Provisions That Differ From Those Found in the GAA.

Section 6 of the GAA, as amended, contains a provision explicitly providing for the taxation of Indian fee lands patented pursuant to that section. Another allotment statute, 25 U.S.C. § 379, contains a provision for the taxation of property alienated thereunder: "All allotted lands so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject of taxation under the law of the State or Territory where the same is situated."

Other allotment acts, however, explicitly provide that the land alienated under those acts is not to be taxed. Cohen at 391 & n.17, 418 n.129 (citing Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (codified at 25 U.S.C. § 501); Act of June 20, 1936, ch. 622, 49 Stat. 1542 (codified as amended at 25 U.S.C. § 412a); Act of Mar. 2, 1931, ch. 374, 46 Stat. 1471 (codified as amended at 25 U.S.C. § 409a); Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 507 ("shall be nontaxable"); 25 U.S.C. §§ 409a, 412a, 465, 487(c), 501, 955; Act of June 28, 1906, ch. 3572, § 2, 34 Stat. 539, 541 (Osages); Act of July 1, 1902, ch. 1375, § 13, 32 Stat. 716, 717 (Cherokees); Act of June 30, 1902, ch. 1323, para. 16, 32 Stat. 500, 503 (Creeks); Act of Mar 1, 1901, ch. 676, para. 7, 31 Stat. 861, 863 (Creeks); Act of July 1, 1898, ch. 542, 30 Stat. 567, 568 (Seminoles); Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 42 (Crows); Act of Jan. 18, 1881, ch. 23, § 5, 21 Stat. 315, 317 (Winnebagos); Act of June 15, 1880, ch. 223, § 4, 21 Stat. 199, 204 (Utes); Act of Mar. 3, 1873, ch. 332, § 3, 17 Stat. 631, 632 (Miamis); Act of Mar. 3, 1865, ch. 127, § 4, 13 Stat., pt. 2 (Public Acts) 541, 562 (Stockbridge-Munsees).

In addition to these allotment statutes which clearly state that the alienated lands are not taxable, some treaties require that allotted land not be taxed. *See* Cohen at 418

& n.129 ("A number of treaties . . . have specified that allotments shall not be taxable.") (citing Treaty with the Omahas, Mar. 6, 1865, art. 4, 14 Stat. 667, 668; Treaty with the Nez Percés, June 9, 1863, art. 3, 14 Stat. 647, 649; Treaty with the Chippewas, July 16, 1859, art. 1, 12 Stat. 1105, 1107; Treaty with the Winnebagoes, Apr. 15, 1859, art. 1, 12 Stat. 1101, 1102).

Still other allotment statutes and treaties are silent with regard to the taxability of the alienated land. *See* Cohen at 410 n.54 (citing 25 U.S.C. §§ 357, 372, 373, 378, 379, 391a, 404, 405).

Consistent with the history of Indian law, alienation of Indian land was a complex process accomplished through a number of statutes and treaties, not only through sections 5 and 6 of the GAA. Many of these allotment statutes and treaty provisions addressed a single tribe's land as the result of individual negotiations between the United States and that tribe. It is no accident that the various alienation laws contained differing provisions concerning taxation of the alienated land. For these reasons, the requisite "unmistakably clear intent" for the taxation of land alienated under other allotment laws cannot be found in sections 5 and 6 of the GAA.

III. ADOPTION OF CASS COUNTY'S RULE THAT ALIENABILITY EQUALS TAXABILITY WOULD SUBSTANTIALLY THWART THE INTENT OF CONGRESS AND FRUSTRATE THE ABILITY OF THE EXECUTIVE BRANCH TO IMPLEMENT THE INDIAN REORGANIZATION ACT OF 1934.

Cass County would have the Court disregard its numerous prior holdings, extend *Yakima* beyond its limits, and hold that states can tax all fee land in Indian Country so long as the land is freely alienable, regardless of ownership and origin of the land, and regardless of whether there is unmistakably clear intent by Congress

for such land to be taxed.[7] Adoption of Cass County's position not only would disregard the "unmistakably clear intent" rule, it would also create an obstacle for the proper and necessary implementation of current federal policy regarding the recapture of trust land lost by Indians and Indian tribes during the allotment period.

A. The Assimilation and Allotment Policies of the 19th Century Envisioned the End of Tribal Autonomy.

Allotment was an assimilationist policy that prevailed in the latter half of the 19th Century. Cohen at 127-43. The goal of allotment and assimilation was to absorb Indians into the mainstream of American life and to destroy the "savagery" created by tribal autonomy. *Id.* at 128-29. The GAA, passed in 1887, was enacted to further this goal, and was an attempt to develop a "new role" for Indians in American society. *Id.* at 130. Congress expected that shortly after passage of the GAA, the Indian reservation system would cease to exist.[8] *See Solem v. Bartlett*, 465 U.S. at 468; *see also Mattz v. Arnett*, 412 U.S. 481, 496 (1973). The destruction of the tribal system was thought inevitable, and allotment was deemed necessary to the civilization of Indians and to their survival in the future. Cohen at 129-139.

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[7] "There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future."

Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1360 (9th Cir. 1993) (Beezer, J., dissenting).

[8] Between 1887 and 1934, more than 90 million acres of land passed out of Indian ownership under the allotment policies of the United States following the end of the treaty-making period in 1871. Cohen at 138, *citing* D. Otis, *The Dawes Act and the Allotment of Indian Lands* (1973).

B. Congress Passed the IRA in Recognition of the Failure of the Assimilation and Allotment Policies, and Intended in the IRA That Tribes Regain Land To Be Placed Into Trust.

For several decades after passage of the GAA, federal policy was aimed at assimilating Indians into society and eliminating tribal autonomy. After it became apparent to Congress in the 1920's that the allotment and assimilation policies had not succeeded and could not succeed, Congress adopted a new policy, which is embodied in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq.*

Through passage of the IRA, Congress recognized that its earlier policies of assimilation and allotment had failed. *Solem v. Bartlett*, 465 U.S. at 468 n.9. As this Court has noted, "the policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. § 461 et seq." *Mattz v. Arnett*, 412 U.S. at 496 n.18. While the issuance of allotments had been discontinued by administrative order prior to enactment of the IRA, Congress in the IRA expressly prohibited any further allotments and created a mechanism by which the Secretary of the Interior could restore lands to tribal ownership. 25 U.S.C. §§ 461, 463. Congress further authorized the Secretary, in his discretion, to acquire and transfer fee lands into trust on behalf of Indians and Indian tribes. 25 U.S.C. § 465.[9]

The IRA and its progeny demonstrate congressional intent to rebuild the tribal land base, in large part through the transfer of fee land within reservations to trust status. Reservation lands which had been deemed "surplus" by prior allotment and other acts were to be restored to the

[9] Amici note that the lands at issue in this case, like the lands regained by amici, are lands held in fee as an interim step in the process of being transferred into trust pursuant to 25 U.S.C. § 465.

beneficial ownership of the tribes.[10] Clearly, the unmistakable intent of Congress in 1934 was to reverse the allotment process and to begin to restore lands to trust status, wherein the United States hold the title for the benefit of the tribe. This Court also has recognized that the IRA was passed to fulfill "Congress' overriding goal of encouraging tribal self-sufficiency and economic development." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143.

Congress recognized in the IRA that a land base, under tribal control, is the foundation of tribal vitality. The unique status of Indian-held lands is a central and indispensable pillar of federal Indian law and federal Indian policy. Further expansion of the taxation of Indian-owned fee lands on reservations would frustrate the congressional intent in the enactment of the IRA.

C. Adoption of the Rule Sought by Cass County Would Unduly Burden the IRA Fee to Trust Process and Unlawfully Place the Burden of the Tax on Indian Tribes.

1. The fee to trust process established under the IRA is already overly-attenuated.

The Department of Interior has established policies and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. 25 C.F.R. Part 151. Authority for these policies and

[10] 25 U.S.C. § 463. The Senate Committee explained this section as follows:

> When allotment was carried out on various reservations, tracts of surplus or ceded land remained unallotted and were placed with the Land Office of the Department of the Interior for sale, the proceeds to be paid to the Indians. Some of these tracts remain unsold and by section 3 of the bill they are restored to tribal use.

S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934).

procedures is principally found in the Indian Reorganization Act of 1934. Land may be put into trust for a tribe when the Secretary determines that "the acquisition of the land is necessary to facilitate tribal self-determination, economic development or Indian housing." 25 C.F.R. § 151.3(a)(3).

The Department of the Interior holds approximately 54 million acres of land in trust or restricted status for either Indian tribes or Indian individuals.[11] Since 1992, however, the amount of land being placed in trust has dropped precipitously. For the six year period from 1986 to 1991, 2,485,000 acres were placed into trust status, at an annual average rate of 414,166 acres per year.[12] From 1992 to 1996, only 215,000 acres were placed in trust, at an annual average rate of 55,000 acres per year, a seven-fold reduction in the amount of land being accepted into trust within one decade.[13] The impact of this sudden and substantial reduction in fee-to-trust acquisitions is magnified by the fact that, in 1996 alone, 130,000 acres of Indian land were removed from trust status, resulting in a net decrease in trust acreage for that year.[14]

There is a growing backlog of pending applications from Indian tribes and individuals who have asked the Department of the Interior to transfer into trust status Indian lands held in fee. In 1997, the Department estimated there were approximately 1,570 pending applications for approximately 275,000 such acres.[15] Yet, for fis-

[11] Bureau of Indian Affairs "Corrected Fact Sheet," Division of Real Estate Services, June 25, 1997 (copies of this document have been lodged with the Clerk).

[12] *Id.*

[13] *Id.*

[14] *Id.* The Department estimates that the acreage taken into trust in 1996 was 55,000, the same rate for each of 1992, 1993, 1994 and 1995. *Id.*

[15] July 16, 1997 letter to U.S. Representative Ernest J. Istook, Jr. from the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, Department of the Interior, and report enclosed there-

cal 1998, the Bureau of Indian Affairs ("BIA") has proposed to continue to review the 1,570 pending applications at a pace of just 150 applications per year.[16] In addition to the acreage included in pending applications, the Navajo Area Office, one of twelve such regional offices of the Bureau of Indian Affairs, reported in mid-1997 that there are an additional 480,000 acres which it considers likely to be the subject of "potential" applications.[17]

Amici each have applications pending with the Department for tribal fee lands to be accepted into trust status. As of mid-1997, amicus Nez Perce Tribe had ten applications pending for a total of approximately 14,200 acres, nearly half of which are within its Reservation. Some of the Nez Perce Tribe's applications have been pending with the Department of the Interior since February 1989. In addition, there are two pending applications filed by Indian individuals for approximately one acre of land each located on the Nez Perce Reservation.

As of mid-1997, the BIA reported that amicus Spokane Tribe of Indians had six applications pending for a total of approximately 1,210 acres, all of which are for lands within the Tribe's Reservation.[18] One of the applications

with. ("Istook Report") (copies of this document have been lodged with the Clerk). According to the detail supplied to the Congress by the Bureau of Indian Affairs, approximately 675 of the applications were from individual Indians and approximately 900 of the applications were from Indian tribes. Approximately 1,300 of the applications are for fee land located within reservation boundaries.

[16] "Major functions [of the BIA Real Estate Services branch] have annually required the review of . . . 150 land acquisition requests. . . ." BIA-77, Justification for the Bureau of Indian Affairs Fiscal Year 1998 Budget Request to Congress (copies of relevant portions of this document have been lodged with the Clerk).

[17] *Id.* Another of the twelve regional offices, the Juneau Area Office, reported no applications pending.

[18] Istook Report. Curiously, amicus Spokane Tribe of Indians' records show that there are in fact nine applications pending which cover 1,640 acres. Similarly, the BIA reported only seven pending

has been pending since December 1969; another since March 1981. In addition, there are 24 pending applications filed by Indian individuals for approximately 1,241 acres of land within the Tribe's Reservation. Four of these pending applications by Indian individuals were filed as long ago as April 1977. Amicus Spokane Tribe of Indians holds additional lands in fee within the Reservation for which it is preparing,[19] but has not yet filed, applications to the Department of the Interior to place the land in trust under 25 C.F.R. § 151. The Spokane Tribe of Indians is also the beneficial owner of approximately 100,221 acres held in trust for it by the United States. An additional 29,614 acres are in restricted status as allotments within the Tribe's Reservation.

As of mid-1997, the BIA reported that amicus Quinault Indian Nation had seven applications pending for a total of approximately 3,594 acres, all of which are for lands located within the Nation's Reservation. One of the applications has been pending since February 1992. In addition, there are five pending applications filed by Indian individuals for less than one acre of land within the Quinault Indian Reservation. One of these pending applications by Indian individuals was filed as long ago as April 1990.

As of mid-1997, amicus Hoopa Valley Tribe had 42 applications pending for a total of approximately 474 acres, all of which are for lands located within the Tribe's Reservation. Forty of these applications have been pend-

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applications filed by amicus Quinault Indian Nation, whose records show that an eighth application for over 10,000 acres is also currently before the BIA. The BIA thus failed to report nearly a quarter of the pending applications, and those omissions understated the total acres outstanding for the two amici by over 300 percent. Copies of the reports from amici Quinault Indian Nation and Spokane Tribe of Indians have been lodged with the Clerk.

[19] An applicant must furnish title evidence to the Secretary meeting the *Standards For The Preparation of Title Evidence In Land Acquisitions by the United States*, issued by the U.S. Department of Justice. 25 C.F.R. § 151.13 (1997).

ing since 1993. In addition, there are 22 pending applications filed by Indian individuals for approximately 146 acres of land within the Hoopa Valley Reservation. All of these pending applications by Indian individuals were filed in 1993. The Reservation of amicus Hoopa Valley Tribe is comprised of 93,756 acres, 90,816 acres of which are held in trust for the Tribe. An additional 1,052 acres are allotted to tribal members. Approximately 2% of the Tribe's Reservation is held in fee, originating as allotted land to individual Indians which was subsequently alienated to non-Indians. The Tribe holds approximately 633 acres of the fee land within its Reservation, some of which are the subject of the pending applications, and for some of which it is preparing,[20] but has not yet filed, applications to the Department of the Interior to place the land in trust under 25 C.F.R. Part 151.

2. *If the "alienability equals taxability" rule is adopted, tribes could risk post-purchase loss of land before trust status is granted.*

Since 1992, some county assessors have been seeking to assess and collect *ad valorum* taxes on the fee lands held by tribal governments, notwithstanding the fact that the tribes have applications pending under 25 C.F.R. § 151 for the land to be accepted into trust status by the Department. If the Court adopts the "alienability equals taxability" rule sought by Cass County in this case, amici and other similarly situated tribes will be faced with mounting local property tax assessments on land they have reacquired and are actively seeking to place into trust status under an increasingly protracted Department of the Interior process. While the rule proposed by Cass County would not permit a state to tax land after it is accepted into trust under 25 C.F.R. Part 151, it would permit a state to burden such land with state taxation during the many intervening years it is held by a tribe while the trust status of the land is under application. This would raise

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[20] *See* n.19, *supra*.

the very real likelihood that, while the petition for trust status languishes before the federal bureaucracy, the land would once again pass out of tribal possession as a result of a forced sale for unpaid state taxes. If Cass County's argument is accepted, and this Court holds that all Indian-owned alienable land is subject to taxation, the fee to trust process authorized in the Indian Reorganization Act of 1934 and set forth in 25 C.F.R. § 151 will be substantially disrupted.

CONCLUSION

For the foregoing reasons, amici Hoopa Valley Tribe, the Nez Perce Tribe, the Quinault Indian Nation and the Spokane Tribe of Indians respectfully request that the decision of the Eighth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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